CONFRONTATION AND COMPULSORY PROCESS
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- THE SIXTH AMENDMENT CONFRONTATION AND COMPULSORY PROCESS CLAUSES AND THEIR RELATIONSHIP TO RULES OF EVIDENCE

Crawford v. Washington
541 U.S. 36 (2004)

- C stabbed a man who allegedly tried to rape his wife
- C claimed self-defense
- C claimed spousal privilege to prevent W from testifying
- W's tape-recorded statement describing stabbing played for jury
- Trial judge admitted statement as having "particularized guarantees of trustworthiness"

Crawford II

- Court of Appeal reversed
- State Supreme Court reinstated conviction
- US Supreme Court reverses in opinion by Justice Scalia
- Court traces right of confrontation in England
  - Trial of Sir Walter Raleigh
- Court examines colonial proceedings

Crawford III

- Court rejects view that Confrontation Clause only applies to in-court testimony
- 6th Amend principally concerned with testimonial evidence
  - E.g., affidavits, custodial examinations, prior uncross-examined testimony, pretrial statements declarants would reasonably expect would be used prosecutorially

Crawford IV

- **Framers would not have allowed testimonial statements of witness who did not appear at trial unless he was unavailable to testify and defendant had a prior opportunity for cross-examination**
- **If declarant appears at trial, there are no constraints on admission of hearsay**
- **"Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."**

Crawford V

- "The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause meant to exclude."
- W was in police custody when she made statement. It is testimonial.
- "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' "

Crawford VI

- "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."
- Court did not decide whether Confrontation applies only to testimonial statements (but see *Whorton v. Bockting*)

Crawford VII

- FN6 Common law did not exclude dying declarations even if testimonial; Court does not decide whether they are an exception
- Court says that in a prior case (*White*) it rejected the argument that the Confrontation Clause only applies to testimonial statements, but that "our analysis in this case casts doubt on that holding," but "we need not definitively resolve whether it survives our decision today, because Sylvia Crawford's statement is testimonial under any definition"

Crawford VIII

- C.J. Rehnquist and J. O'Connor dissent from decision to overrule *Roberts*
  - Concurs in judgment since "[t]he result the Court reaches follows inexorably from *Roberts* and its progeny . ."
- Court's new interpretation is not backed by sufficiently persuasive reasoning to overrule long-established precedent
- Court's distinction between testimonial and non-testimonial statements is no better rooted in history than current doctrine

FORMER TESTIMONY
Cases That Remain Good Law After Crawford v Washington

- *Barber v. Page*, 390 U.S. 719 (1968) (state failed to demonstrate good faith effort to produce witness before offering preliminary hearing testimony)
- *California v. Green*, 399 U.S. 149 (1970) (preliminary hearing testimony of witness present in court may be used)
- *Mancusi v. Stubbs*, 408 U.S. 204 (1972) (no showing required of effort to produce witness who had moved to Sweden)
- *Ohio v. Roberts*, 448 U.S. 56 (1980) (unavailability shown where witness left state and parents did not know how to contact her)

Pre-Crawford Cases and the Impact of Crawford

- *California v. Green*, 399 U.S. 149 (1970) (prior inconsistent statements of available witnesses may be used if witness may be cross-examined at trial) (consistent with *Crawford*)
- *Dutton v. Evans*, 400 U.S. 74 (1970) (co-conspirator statement admissible even though made after arrests; not crucial or devastating) (consistent with *Crawford* if consistent with furthering conspiracy)
- *Ohio v. Roberts*, 448 U.S. 56 (1980) (two-prong test for admissibility; is witness unavailable, and if so, do statements possess indicia of reliability) (overruled by *Crawford*)
- *United States v. Inadi*, 475 U.S. 387 (1986) (no showing required of unavailability for conspirator statements; Roberts limited to former testimony) (consistent with *Crawford*)

Pre-Crawford Cases Bourjaily and Wright

- *Bourjaily v. United States*, 483 U.S. 171 (1987) (well-established (or firmly rooted) exceptions satisfy Confrontation) (irrelevant after *Crawford*; only question is whether statement is testimonial)
- *Idaho v. Wright*, 497 U.S. 805 (1990) (admissibility of child's statement to doctor regarding father's abuse does not fall within a firmly rooted exception and requires indicia of trustworthiness, not simply corroboration by other evidence) (irrelevant after *Crawford* ; only question is whether statement is testimonial)

Pre-Crawford Cases *Lilly v. Virginia*, 527 U.S. 116 (1999)

- Admission of brother's confession as declaration against interest violated Confrontation Clause
- Unanimous Court on judgment; divided Court on rationale
- Today only question is whether the statement is testimonial

Davis v. WA; Hammon v. IN 547 U.S. 813 (2006)

- Davis – 911 call, terminated, and operator calls back
- Michelle McCottry (MM) answered and operator ascertains a domestic disturbance, Davis ran out door, and was leaving in car
- Police arrive within 4 minutes
- See fresh injuries on forearm and face
- MM did not appear at trial
- 911 call admitted

Davis & Hammon II

- Hammon– reported domestic disturbance at home of Amy and Hershel Hammon
- Police find Amy on front porch, appearing somewhat frightened
  - Tells them "nothing was the matter"
  - Gives them permission to enter
  - Gas hearing unit had flames coming out of a partial glass front, pieces of glass on ground in front
- H in kitchen
  - Says there was an argument
  - Nothing physical

Davis & Hammon III -- Hammon

- Amy and officer go to living room
- Amy wrote out and signed a battery affidavit
- Amy subpoenaed but did not appear at bench trial
- Officer testifies to what Amy said and wrote

Davis & Hammon IV

- "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."

Davis & Hammon V

- "They are testimonial when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

Davis & Hammon VI

- "We must decide, therefore, whether the Confrontation Clause applies only to testimonial hearsay; and, if so, whether the recording of a 911 call qualifies."
- The answer to the first question was suggested in *Crawford*, even if not explicitly held:"
- "A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark not merely its 'core,' but its perimeter."
- DOES THIS OVERRULE ROBERTS W/O ACTUALLY SAYING SO? *Whorton v. Bockting* answers the question -- YES

Davis & Hammon VII

- "[W]e do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition."

Davis & Hammon VII -- Davis

- In Davis, MM was speaking about events as they were happening
- 911 interrogation by operator was to meet an emergency
- Conversation that begins as an interrogation to determine the need for emergency assistance may evolve into testimonial statements
  - Court only was asked to address MM's early statements
  - State Supreme Court found any error in admission of the other statements was harmless (not reviewed here)
- Trial courts may have to draw lines

Davis & Hammon VIII -- Hammon

- Hammon – interrogation was part of an investigation into past criminal conduct and statements were testimonial
- Some questions at crime scene might yield nontestimonial answers
- Court rejects special rule for domestic violence cases
- Reminds, however, that forfeiture by wrongdoing may extinguish Confrontation rights

Davis & Hammon IX

- J. Thomas, concurring in part and dissenting in part.
- Testimonial should be limited to formalized declarations.
- Neither *Davis* nor *Hammon* involve formalized dialogues.

WHORTON V. BOCKTING, 549 U.S. 406 (2007)

- Alito, J. for unanimous court
- Father charged with sexual assault of 6-year-old stepdaughter
- Step-daughter interviewed by detective and describes assault in detail using anatomically correct doll
- At preliminary hearing, step-daughter became upset and said she could not remember how B touched her or what she told her mother or the detective

WHORTON V. BOCKTING II

- At trial, step-daughter was too upset to testify
- Mother and detective testified to daughter's statements
- Nevada had a child hearsay exception
- Jury finds B guilty – 2 consecutive life sentences and 1 concurrent life sentence

WHORTON V. BOCKTING III

- 1993 Nevada Supreme Court upholds conviction relying on *Roberts*
- B filed habeas petition, it's denied, and B appealed
- *Crawford* decided while appeal pending
- Divided panel found *Crawford* retroactive
- Supreme Court reversed – *Crawford* not retroactive
- Court says it overruled *Roberts* in *Crawford*

Likely Effects of Crawford et al

- Non-hearsay statements - no Crawford issue
- 801 (d)1) – no problem – witness present
- 801 (d)(2) (C) and (D) –could be testimonial – but not (E) except in rare case
- 803 and 804 – must examine statement by statement except for 804 (b)(1) (ok) and (b)(6) (ok)

Melendez-Diaz v. Mass, 557 U.S. 305 (2009)

- M-D tried on charges alleging that he distributed cocaine and trafficked in cocaine
- Prosecution offered certificates signed by state laboratory analysts stating that evidence was cocaine
- 6th Amend objection -- the objection overruled
- State court affirms
- Held: Certificates were affidavits, which fell within the core class of testimonial statements and were made under circumstances which would have led an objective witness reasonably to believe that they were made for use in a criminal trial. Although petitioner could have subpoenaed the analysts, that right was not a substitute for his right to confront them.

Melendez-Diaz (cont)

- 5-4 Ruling (Scalia for majority)
- Rejects argument that analysts are not "accusatory witnesses"
  Rejects argument that witnesses who testify regarding facts other than those observed at the crime scene are exempt from confrontation
- Absence of interrogation irrelevant; volunteers = witnesses
- Neutral scientific testing is not immune from confrontation
- Confrontation is not relaxed if it makes the prosecution's task burdensome.
- Some states already make this work
- Kennedy dissents, jointed by Roberts, Breyer and Alito

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Melendez-Diaz (cont)

- "Contrary to the dissent's suggestion, we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While the dissent is correct that it is the obligation of the prosecution to establish the chain of custody, this does not mean that everyone who laid hands on the evidence must be called. . . .

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Melendez-Diaz (cont)

- "Nor is it evident that what respondent calls "neutral scientific testing" is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation. According to a recent study conducted under the auspices of the National Academy of Sciences, 't]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency.' National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward 6-1 (Prepublication Copy Feb. 2009) (hereinafter National Academy Report). . . .

Melendez-Diaz (cont)

- "And '[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.' Id., at S-17. A forensic analyst responding to a request from a law enforcement official may feel pressure — or have an incentive — to alter the evidence in a manner favorable to the prosecution."

Melendez-Diaz (cont)

- "Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination.
- "This case is illustrative. The affidavits submitted by the analysts contained only the bare-bones statement that "[t]he substance was found to contain: Cocaine." At the time of trial, petitioner did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed. While we still do not know the precise tests used by the analysts, we are told that the laboratories use 'methodology recommended by the Scientific Working Group for the Analysis of Seized Drugs.' At least some of that methodology requires the exercise of judgment and presents a risk of error that might be explored on cross-examination."

Melendez-Diaz (cont)

- "Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. See Fed. Rule Evid. 803(6). But that is not the case if the regularly conducted business activity is the production of evidence for use at trial. Our decision in *Palmer v. Hoffman,* 318 U. S. 109 (1943), made that distinction clear. There we held that an accident report provided by an employee of a railroad company did not qualify as a business record because, although kept in the regular course of the railroad's operations, it was 'calculated for use essentially in the court, not in the business.' The analysts' certificates — like police reports generated by law enforcement officials — do not qualify as business or public records for precisely the same reason. See Rule 803(8) (defining public records as 'excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel')."

Melendez-Diaz (cont)

- "The dissent identifies a single class of evidence which, though prepared for use at trial, was traditionally admissible: a clerk's certificate authenticating an official record -or a copy thereof - for use as evidence. But a clerk's authority in that regard was narrowly circumscribed. He was permitted "to certify to the correctness of a copy of a record kept in his office," but had "no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect." *State v. Wilson,* 141 La. 404, 409, 75 So. 95, 97 (1917). The dissent suggests that the fact that this exception was narrowly circumscribed makes no difference. To the contrary, it makes all the difference in the world. It shows that even the line of cases establishing the one narrow exception the dissent has been able to identify simultaneously vindicates the general rule applicable to the present case. A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant."

Melendez-Diaz (cont) – Justice Kennedy's Dissent

- "The Court sweeps away an accepted rule governing the admission of scientific evidence. Until today, scientific analysis could be introduced into evidence without testimony from the 'analyst' who produced it. This rule has been established for at least 90 years. It extends across at least 35 States and six Federal Courts of Appeals. Yet the Court undoes it based on two recent opinions that say nothing about forensic analysts: *Crawford v. Washington*, 541 U. S. 36 (2004), and *Davis v. Washington*, 547 U. S. 813 (2006)."

Melendez-Diaz (cont) – Justice Kennedy's Disssent

- "It is remarkable that the Court so confidently disregards a century of jurisprudence. We learn now that we have misinterpreted the Confrontation Clause — hardly an arcane or seldom-used provision of the Constitution — for the first 218 years of its existence. The immediate systemic concern is that the Court makes no attempt to acknowledge the real differences between laboratory analysts who perform scientific tests and other, more conventional witnesses — 'witnesses' being the word the Framers used in the Confrontation Clause."

Melendez-Diaz (cont) – Justice Kennedy's Dissent

- "* * * There is no accepted definition of analyst, and there is no established precedent to define that term.
- "Consider how many people play a role in a routine test for the presence of illegal drugs. One person prepares a sample of the drug, places it in a testing machine, and retrieves the machine's printout — often, a graph showing the frequencies of radiation absorbed by the sample or the masses of the sample's molecular fragments. * * * A second person interprets the graph the machine prints out-perhaps by comparing that printout with published, standardized graphs of known drugs. Meanwhile, a third person — perhaps an independent contractor — has calibrated the machine and, having done so, has certified that the machine is in good working order. Finally, a fourth person — perhaps the laboratory's director — certifies that his subordinates followed established procedures."

Melendez-Diaz (cont) – Justice Kennedy's Dissent

- "It is not at all evident which of these four persons is the analyst to be confronted under the rule the Court announces today. If all are witnesses who must appear for in-court confrontation, then the Court has, for all practical purposes, forbidden the use of scientific tests in criminal trials. * * * [R]equiring even one of these individuals to testify threatens to disrupt if not end many prosecutions where guilt is clear but a newly found formalism now holds sway.
- "It is possible to read the Court's opinion, however, to say that all four must testify. * * *
- "And each of the four has power to introduce error. * * *
- "Today's decision demonstrates that even in the narrow category of scientific tests that identify a drug, the Court cannot define with any clarity who the analyst is. Outside this narrow category, the range of other scientific tests that may be affected by the Court's new confrontation right is staggering."

Bullcoming v. New Mexico
131 S. Ct. 2705 (2011) (DWI Case)

- Court (Ginsburg) reaffirmed *Melendez-Diaz* and held further that the Confrontation Clause was not satisfied when such a certificate was entered into evidence through the testimony of a person who was not involved with and had no personal knowledge of the testing procedure.
- Bullcoming's blood sample was tested at N. Mex. Department of Health, Scientific Laboratory Division by a forensic analyst named Caylor, who completed, signed, and certified the report. Prosecution did not call Caylor to testify or assert he was unavailable
- Record showed only that Caylor was placed on unpaid leave for an undisclosed reason
- Pros. Called another analyst, Razatos, to validate the report. He was familiar with the testing device used to analyze Bullcoming's blood and with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample

Bullcoming v. New Mexico
(cont) (Sotomayor Concurring in Judgment)

- "First, this is not a case in which the State suggested an alternate purpose, much less an alternate primary purpose, for the BAC report. For example, the State has not claimed that the report was necessary to provide Bullcoming with medical treatment."
- "Second, this is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue."
- "Third, this is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence."
- "Finally, this is not a case in which the State introduced only machine-generated results, such as a printout from a gas chromatograph. The State here introduced Caylor's statements . . .."

Bullcoming v. New Mexico (cont) (Kennedy Dissent)

- Justice Kennedy, joined by the Chief Justice and Justices Breyer and Alito, dissented in *Bullcoming* for essentially the same reasons that they dissented in *Melendez-Diaz*.
- "It is not even clear which witnesses' testimony could render a scientific report admissible under the Court's approach. Melendez-Diaz stated an inflexible rule: Where "analysts' affidavits" included "testimonial statements," defendants were "entitled to be confronted with the analysts" themselves. . . . Now, the Court reveals, this rule is either less clear than it first appeared or too strict to be followed. A report is admissible, today's opinion states, if a 'live witness competent to testify to the truth of the statements made in the report' appears. . . . Such witnesses include not just the certifying analyst, but also any 'scientist who . . . perform[ed] or observe[d] the test reported in the certification.' "

Williams v. Illinois 132 S. Ct. 2221 (2012)

- Five days after deciding *Bullcoming*, the Court granted *certiorari* in this rape case
- Crucial proof of identity was evidence of a DNA match
- Sandra Lambatos, a forensic spe- cialist at the Illinois State Police lab, testified that she matched a DNA profile produced by an outside laboratory, Cellmark, to a profile the state lab produced using a sample of petitioner's blood. She testi- fied that Cellmark was an accredited laboratory and that business records showed that vaginal swabs taken from the victim, L. J., were sent to Cellmark and returned. She offered no other statement for the purpose of identifying the sample used for Cellmark's profile or establishing how Cellmark handled or tested the sample. Nor did she vouch for the accuracy of Cellmark's profile.
- The state supreme court distinguished *Melendez-Diaz* principally on the basis that the report was used as the basis for the opinion of the in-court witness as to the DNA match.
- The petitioner claimed that the substance of the report was presented to the trier of fact, and that it was used for the truth of what it asserted.

Williams v. Illinois (Alito with C.J. Roberts, Kennedy & Breyer

- References to Cellmark in the trial record either were not hearsay or were not offered for the truth of the matter asserted.
- When Lambatos answered "yes" to a question about whether there was a match between the DNA profile "found in semen from the vaginal swabs of [L. J.]" and the one identified as petitioner's, she simply assumed that the vaginal swabs were those of the victim.
- Because this was a bench trial, the Court assumes that the trial judge understood that the testimony was not admissible to prove the truth of the matter asserted. It is also unlikely that the judge took the testimony as providing chain-of-custody evidence. The record does not support such an understanding; no trial judge is likely to be so confused; and the admissible evidence left little room for argument that Cellmark's sample came from any source but L. J.'s swabs, since the profile matched the very man she identified in a lineup and at trial as her attacker.

Williams v. Illinois (Alito, joined by C.J. Roberts and Kennedy and Breyer)

- Cellmark's report did not need to be introduced in order to show that Cellmark's profile was based on the semen in L. J.'s swabs or that its procedures were reliable.
- If there were no proof that Cellmark's profile was accurate, Lambatos' testimony would be irrelevant, but not a Confrontation violation.
- The State offered conventional chain-of-custody evidence, and the match between Cellmark's profile and petitioner's was telling confirmation that Cellmark's profile was deduced from the semen on L. J.'s swabs. The match also provided strong circumstantial evidence about the reliability of Cellmark's work.

Williams v. Illinois (Alito, joined by C.J. Roberts and Kennedy and Breyer)

- Even if Cellmark's report had been introduced for its truth, there would have been no Confrontation Clause violation. The Clause refers to testimony by "witnesses against" an accused, prohib- iting modern-day practices that are tantamount to the abuses that gave rise to the confrontation right, namely, (a) out-of-court state- ments having the primary purpose of accusing a targeted individual of engaging in criminal conduct, and (b) formalized statements such as affidavits, depositions, prior testimony, or confessions.
- Cellmark report's primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time. Nor could anyone at Cellmark possibly know that the profile would inculpate petitioner.

Williams v. Illinois (Thomas concurring)

- No plausible reason for admitting Cellmark's statements other than to prove the truth.
- Cellmark's report is not a statement by a witness under the Confrontation Clause. It lacks the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact. And, although it was produced at the request of law enforcement, it was not the product of formalized dialogue resembling custodial interrogation.

Williams v. Illinois (Breyer concurring)

- This case raises a question that I believe neither the plurality nor the dissent answers adequately: How does the Confrontation Clause apply to the panoply of crime laboratory reports and underlying technical statements written by (or otherwise made by) laboratory technicians? In this context, what, if any, are the outer limits of the "testimonial statements" rule set forth in Crawford v. Washington, 541 U. S. 36 (2004)? Because I believe the question difficult, important, and not squarely addressed either today or in our earlier opinions, and because I believe additional briefing would help us find a proper, generally applicable answer, I would set this case for reargument. In the absence of doing so, I adhere to the dissenting views set forth in Melendez-Diaz v. Massachusetts, 557 U. S. 305 (2009), and Bullcoming v. New Mexico, 564 U. S. ___ (2011). I also join the plurality's opinion."

Williams v. Illinois (Kagan, joined by Scalia, Ginsburg, & Sotomayor dissenting)

- "Under our Confrontation Clause precedents, this is an open-and-shut case. The State of Illinois prosecuted Sandy Williams for rape based in part on a DNA profile created in Cellmark's laboratory. Yet the State did not give Williams a chance to question the analyst who pro- duced that evidence."
- 5 Justices reject the Alito reasoning
- "Viewed side-by-side with the Bullcoming report, the Cellmark analysis has a comparable title; similarly describes the relevant samples, test methodology, and results; and likewise includes the signatures of laboratory officials."
- "Lambatos's statements about Cellmark's report went to its truth, and the State could not rely on her status as an expert to circumvent the Confrontation Clause's requirements."

Michigan v Bryant
131 S.Ct. 1143 (2011) (Sotomayor)

- 3:25 a.m. police officers responded to a radio dispatch indicating that a man had been shot.
- They found the victim, Anthony Covington, lying on the ground next to his car in a gas station parking lot with a gunshot wound to his abdomen; he appeared to be in great pain, and spoke with difficulty
- The police asked him "what had happened, who had shot him, and where the shooting had occurred." Covington stated that "Rick" shot him at around 3 a.m. He also indicated that he had a conversation with Bryant, whom he recognized based on his voice, th rough the back door of Bryant's house. Covington explained that when he turned to leave, he was shot through the door and then drove to the gas station, where police found him.
- Covington's conversation with the police ended within 5 to 10 minutes when emergency medical services arrived. Covington was transported to a hospital and died within hours.

Michigan v Bryant
(cont)

- When, as in *Davis*, the primary purpose of an interrogation is to respond to an "ongoing emergency," its purpose is not to create a record for trial and thus is not within the scope of the Clause. But there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony. In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant. Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause."
- "To determine whether the 'primary purpose' of an interrogation is 'to enable police assistance to meet an ongoing emergency,' which would render the resulting statements nontestimonial, we objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties."

Michigan v Bryant (cont)

- "An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the 'primary purpose of the interrogation. The circumstances in which an encounter occurs— e.g., at or near the scene of the crime versus at a police station, during an ongoing emergency or afterwards—are clearly matters of objective fact. The statements and actions of the parties must also be objectively evaluated. That is, the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred."

Michigan v Bryant (cont)

- "Implicit in *Davis* is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination."
- "This logic is not unlike that justifying the excited utterance exception in hearsay law."
- "Domestic violence cases like *Davis* and *Hammon* often have a narrower zone of potential victims than cases involving threats to public safety. An assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue."
- "The Michigan Supreme Court also did not appreciate that the duration and scope of an emergency may depend in part on the type of weapon employed."

Michigan v Bryant (cont)

- "The medical condition of the victim is important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one. The victim's medical state also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public."
- "Another factor the Michigan Supreme Court did not sufficiently account for is the importance of informality in an encounter between a victim and police. Formality is not the sole touchstone of ou r primary purpose inquiry because, although formality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution, informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent."

Michigan v Bryant (cont)

- "In addition to the circumstances in which an encounter occurs, the statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation."
- Nothing Covington said to the police indicated that the cause of the shooting was a purely private dispute or that the threat from the shooter had ended. The record reveals little about the motive for the shooting."
- "At no point during the questioning did either Covington or the police know the location of the shooter. In fact, Bryant was not at home by the time the police searched his house at approximately 5:30 a.m. At some point between 3 a.m. and 5:30 a.m., Bryant left his house. At bottom, there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded Covington within a few blocks and a few minutes of the location where the police found Covington."

Michigan v Bryant (cont)

- "This situation is more similar, though not identical, to the informal, harried 911 call in *Davis* than to the structured, station-house interview in *Crawford*."
- "Because the circumstances of the encounter as well as the statements and actions of Covington and the police objectively indicate that the "primary purpose of the interrogation" was "to enable police assistance to meet an ongoing emergency," . . . Covington's identification and description of the shooter and the location of the shooting were not testimonial hearsay. The Confrontation Clause did not bar their admission at Bryant's trial."

Michigan v Bryant (Thomas, concurring)

- "Rather than attempting to reconstruct the "primary purpose" of the participants, I would consider the extent to which the interrogation resembles those historical practices that the Confrontation Clause addressed. . . . As the majority notes, Covington interacted with the police under highly informal circumstances, while he bled from a fatal gunshot wound. The police questioning was not "a formalized dialogue," did not result in "formalized testimonial materials" such as a deposition or affidavit, and bore no "indicia of solemnity." . . . Nor is there any indication that the statements were offered at trial 'in order to evade confrontation.' . . . This interrogation bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate."

Michigan v Bryant (Scalia dissent)

- "Today's tale—a story of five officers conducting successive examinations of a dying man with the primary purpose, not of obtaining and preserving his testimony regarding his killer, but of protecting him, them, and others from a murderer somewhere on the loose—is so transparently false that professing to believe it demeans this institution. But reaching a patently incorrect conclusion on the facts is a relatively benign judicial mischief; it affects, after all, only the case at hand. In its vain attempt to make the incredible plausible, however—or perhaps as an intended second goal—today's opinion distorts our Confrontation Clause jurisprudence and leaves it in a shambles. Instead of clarifying the law, the Court makes itself the obfuscator of last resort."

Michigan v Bryant (Scalia dissent)

- "Looking to the declarant's purpose (as we should), this is an absurdly easy case. * * * From Covington's perspective, his statements had little value except to ensure the arrest and eventual prosecution of Richard Bryant. * * * Even if Bryant had pursued him (unlikely), and after seeing that Covington had ended up at the gas station was unable to confront him there before the police arrived (doubly unlikely), it was entirely beyond imagination that Bryant would again open fire while Covington was surrounded by five armed police officers. And Covington knew the shooting was the work of a drug dealer, not a spree killer who might randomly threaten others."
- "Covington's pressing medical needs do not suggest that he was responding to an emergency, but to the contrary reinforce the testimonial character of his statements. He understood the police were focused on investigating a past crime, not his medical needs."

Giles v. California
554 U.S. 353 (2008) (Scalia)

- Held that a defendant does not forfeit his constitutional right to confront testimonial hearsay unless the government shows that the defendant engaged in wrongdoing *designed to keep the witness from testifying at trial.*
- Giles was charged with the murder of his former girlfriend. A short time before the murder, Giles had assaulted the victim, and she made statements to the police implicating Giles in that assault. The victim's hearsay statements were admitted against the defendant on the ground that he had forfeited his right to rely on the Confrontation Clause, by murdering the victim. The government made no showing that Giles murder the victim with the intent to keep her from testifying.
- Justice Scalia found an intent-to-procure requirement in the common law, and therefore, under the historical analysis mandated by *Crawford*, there were necessarily an intent-to-procure requirement for forfeiture of confrontation rights.

Giles v. California
(cont)

- Justice Thomas wrote a short concurring opinion indicating his belief that the victim's statements to police officers were not testimonial in the first place. They were made to responding police officers and therefore were not the type of formal statements that constituted "testimony" under the common law.
- Justice Alito wrote a short concurring opinion agreeing with Justice Thomas.
- Justice Souter also wrote a short concurring opinion, joined by Justice Ginsburg, in which he emphasized a point made by the majority -- forfeiture could be found in a domestic violence case by implicit threats and acts of aggression.
- Justice Breyer, joined by Justices Stevens and Kennedy, dissented.

Giles v. California (Breyer dissent)

- "Regardless of a defendant's purpose, threats, further violence, and ultimately murder, can stop victims from testifying. * * * A constitutional evidentiary requirement that insists upon a showing of purpose (rather than simply intent or probabilistic knowledge) may permit the domestic partner who made the threats, caused the violence, or even murdered the victim to avoid conviction for earlier crimes by taking advantage of later ones."

Limiting Instructions and Confessions

- *Bruton v. United States*, 391 U.S. 123 (1968) (limiting instruction insufficient protection for defendant implicated by non-testifying co-defendant's confession)
- *Harris v. New York*, 401 U.S. 222 (1971) (impeachment use of statements obtained in violation of Miranda)
- *Parker v. Randolph*, 442 U.S. 62 (1979) (plurality creates interlocking confessions exception to Bruton) But see *Cruz v. New York*, 481 U.S. 186 (1987) (rejecting *Parker* and interlocking confession rule)
- *Tennessee v. Street*, 471 U.S. 409 (1985) (statement offered not for truth, but to rebut defendant's claim that he was shown co-defendant's confession and directed to say the same thing)

Limiting Instructions and Confessions

- *Lee v. Illinois*, 476 U.S. 530 (1986) (co-defendant's confession presumptively unreliable notwithstanding some overlap between co-defendant's and defendant's confessions; declarations against interest analysis too broad to withstand analysis – probably not important after *Crawford)*

Limiting Instructions and Confessions

- *Richardson v. Marsh*, 481 U.S. 200 (1987) (limiting instruction sufficient where non-testifying defendant does not explicitly implicate co-defendant and other evidence might connect co-defendant to facts revealed in confession)
- *Gray v. Maryland*, 523 U.S. 185 (1998) (redacting defendant's name and leaving a blank space does not satisfy *Bruton*)

COMPULSORY PROCESS

Competency Restrictions

- *Washington v. Texas*, 388 U.S. 14 (1967) (restriction on defense right to offer testimony of codefendant invalidated)
- *Rock v. Arkansas*, 483 U.S. 44 (1987) (per se exclusion of defendant's testimony because refreshed by hypnosis invalid)
- *Holmes v. S. Car.*, 126 S. Ct. 1727 (2006) (Due Process, Confrontation or Compulsory Process prevent arbitrary state rule excluding evidence that third party committed the crime; rule excluding defense evidence where there is strong evidence of D's guilt, especially forensic evidence, is arbitrary)

Hearsay

- *Chambers v. Mississippi*, 410 U.S. 284 (1973) (error to both bar cross-examination of witness called by defendant with prior oral statements and to exclude evidence of the statements)

- *Green v. Georgia*, 442 U.S. 95 (1979) (error for court to exclude co-defendant's confession offered by defendant in capital sentencing proceeding; prosecution had relied on confession in trial of the co-defendant)